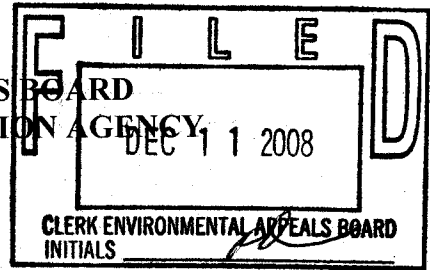


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:)

Mirant Canal, LLC)

NPDES Permit No. MA0004928)

NPDES Appeal No. 08-10

**ORDER DISMISSING PETITION FOR REVIEW
WITHOUT PREJUDICE**

On December 4, 2008, Region 1 of the United States Environmental Protection Agency filed a Status Report and Motion for Stay of Proceedings in the above-captioned appeal. The Region explains in this filing that it intends to withdraw certain provisions of the challenged Clean Water Act discharge permit and will then re-notice the provisions as draft permit conditions for public comment, consider public comments received, write responses to significant comments, and prepare new final permit conditions. Status Report and Motion for Stay of Proceedings at 3. The Region seeks a stay of the pending permit appeal proceedings until June 1, 2009, to complete these activities. *Id.* at 4.

By letter also dated December 4, 2008, the Region began implementing this plan. The Region notified affected parties and the Environmental Appeals Board of its intent to withdraw the following conditions of the final permit: I.A.2.f (cooling tower blowdown limits); I.A.7.f (heat load reporting requirements); I.A.8 (source water physical data and cooling water intake structure data provision requirements); and I.A.13.g-h (cooling water intake structure requirements). Letter from Robert W. Varney, Regional Administrator, U.S. EPA Region 1, to Eurika Durr, Clerk, Environmental Appeals Board, U.S. EPA, & Ralph A. Child, Esq., Mirant Canal, LLC 2 (Dec. 4, 2008). Under the permitting regulations, the Region has an absolute right

to withdraw a final permit, or portions thereof, at any time prior to the Board's rendering of a decision on a pending petition for review of such permit. 40 C.F.R. § 124.19(d). Accordingly, the Region's action of December 4th is timely.

On December 8, 2008, Mirant Canal, LLC, filed an answer to the Region's status report and motion. Mirant Canal supports the Region's request for a stay of proceedings but asks that the Board direct the Region to expand the scope of the provisions that will be re-noticed and upon which public comment will be sought. Answer to Status Report and Motion for Stay at 2-4. Mirant Canal lists a number of permit conditions it believes are "inextricably intertwined" with or a "logical outgrowth" of the disputed conditions and asks that the Board order the Region to accept comments on those and related issues. *Id.* at 3-4.

Notably, the Region has already begun the process of withdrawing certain permit terms and re-noticing permit conditions for public comment. It is doing so by virtue of its specific authority under 40 C.F.R. § 124.19(d) and not by direction of this Board. Thus, the Board has no authority at this juncture to order that the scope of the Region's permitting actions be broadened.

Given, however, the Region's withdrawal of significant portions of Mirant Canal's final permit, the potential existence of interrelationships among permit terms, and the fact that the initial briefing on the petition was never completed,¹ the Board hereby dismisses Mirant Canal's petition for review without prejudice.² Mirant Canal may raise in a future petition any issue that

¹ Still pending at this writing are Mirant Canal's request to file a supplemental petition for review of the final permit and the Region's request for substantial additional time to file a response to Mirant's petition.

² In light of our dismissal of the petition, the Region's request for a stay of these appeal proceedings is moot.

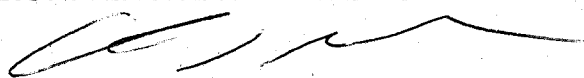
it raised in the present petition, along with any other issues arising from the Region's future proceedings on the withdrawn permit conditions.

The Board requests that the Region file a status report with the Board no later than two weeks after the close of the public comment period on the new permit conditions, or June 1, 2009, whichever is earlier.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: 12/11/08

By: 

Edward E. Reich
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Order Dismissing Petition for Review Without Prejudice** in the matter of *In re Mirant Canal, LLC*, NPDES Appeal No. 08-10, were sent to the following persons in the manner indicated:

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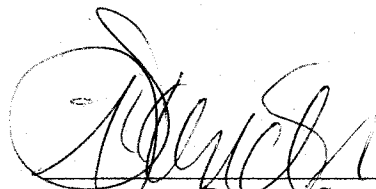
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Date: DEC 11 2008


Annette Duncan, Secretary